Herukh Thakurdas Jethwani & Anor v Bank Simpanan Nasional

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC-332–06 OF 2019
ONG CHEE KWAN JC
28 OCTOBER 2020

Contract — Agreement — Housing loan — Defendant granted plaintiffs housing loan — Loan secured by two guarantees — Plaintiffs defaulted in repayment of loan — Defendant entered judgment in default against plaintiffs and guarantors — Plaintiffs paid defendant under judgment in default — Defendant contended that there was still outstanding payment by plaintiffs and guarantors — Whether judgment was against the plaintiffs and the guarantors jointly or jointly and severally — Whether there was difference to extent of obligation of each of the parties to pay judgment sum where judgment was entered against two or more parties

The defendant granted to the first and second plaintiffs a housing loan amounting to RM3.76m ('the loan') to finance the purchase of a house at No 5 Jalan Lembah Tunku, Bukit Tunku, Kuala Lumpur ('the property'). The loan was secured by two guarantees, namely, a personal guarantee from the first and second plaintiffs' father, one Thakurdas a/l Naraindas and a corporate guarantee by one MAX Celebrity (M) Sdn Bhd ('the letters of guarantee'). The property was also charged to the defendant as further security for the loan. The first and second plaintiffs defaulted in the repayment of the loan and the defendant filed a civil action vide Suit No D8–22–246 of 2008 in the Kuala Lumpur High Court against the plaintiffs and the guarantors ('the 246 Suit'). The defendant entered judgment in default of defence against the plaintiffs and the guarantors. The plaintiffs paid a sum of RM3,915,313.76 to the defendant under the judgment. However, according to the defendant, there was still outstanding and due under the judgment a sum of RM1,186,048.50 as at 17 March 2014. The plaintiffs' ground for the claims in encl 1 against the defendant was that the obligation of the parties to pay the judgment sum under the judgment was necessarily a joint obligation as the judgment did not expressly state that the obligations are joint and several. As a joint obligation, the plaintiffs contended that each of the judgment debtors was only liable to pay an aliquot or pro-rated share of the judgment sum, ie each judgment debtor was obliged to pay only RM947,725.73 being 25% of RM3,790,902.92 as at 12 June 2008 as adjudged in the judgment. The issues for determination were: (a) whether the judgment was against the plaintiffs and the guarantors jointly or jointly and severally; and (b) whether there was a difference to the extent of the obligation of each of the parties to pay the

judgment sum where a judgment was entered against two or more parties and the judgment was silent or had not stated that the liability of the parties are joint and several.

Held, dismissing plaintiff's application in encl 1 with costs of RM8,000:

(1) Notwithstanding that the judgment was silent as to whether the obligations for the judgment sum were joint and several or joint only, the defendant's rights against the plaintiff was on a joint and several basis as provided for in the annexure aforesaid and it continues to survive the judgment. As with both the case of the joint obligation and the several obligations, upon the creditor obtaining judgment against the joint and several obligors, the creditor may proceed to enforce against each of the obligors for the entirety of the obligation. Whether a particular contract gives rise to a joint or several or joint and several obligations will depend on the intentions of the parties. In the case of joint and several liability, the right of contribution between the joint and several obligors depends for its existence upon the election of the creditor to sue jointly or an election to sever which would deprives the obligors of their right of contribution (see paras 21 & 32–33 & 38).

(2) Under common law, there was a distinction between joint obligations and joint and several obligations when it came to the issue of non-joinder of parties. In the case of joint obligations, if one or more of the joint obligors were not joined in an action, any judgment that was obtained against the joint obligors who were made defendants in the suit would operate as a bar to any subsequent action against the parties not joined. In the case of several obligations, it was clear that each of the obligors might be sued separately and individually with no relation to his co-obligor. In the case of joint and several obligations, it would seem that the duty of each obligor was either joint or several at the discretion of the creditor. The creditor might either choose to proceed against each of the obligors severally or against all of them jointly, at his discretion. The non-joinder of a joint obligor did not at all mean that each of the joint obligors was only liable for their aliquot share of the debt as contended by learned counsel for the plaintiffs (see paras 45–49).

[Bahasa Malaysia summary

Defendan telah meluluskan kepada plaintif pertama dan kedua pinjaman perumahan berjumlah RM3,760,000 ('pinjaman tersebut') untuk membiayai pembelian rumah di No 5 Jalan Lembah Tunku, Bukit Tunku, Kuala Lumpur ('hartanah tersebut'). Pinjaman tersebut dijamin oleh dua penjamin, iaitu jaminan peribadi dari bapa plaintif pertama dan kedua, seorang Thakurdas a/l Naraindas dan jaminan korporat oleh satu MAX Celebrity (M) Sdn Bhd ('surat jaminan tersebut'). Hartanah tersebut juga telah digadai kepada defendan sebagai jaminan pinjaman. Plaintif pertama dan kedua gagal dalam

pembayaran semula pinjaman tersebut dan defendan memfailkan tuntutan sivil melalui Saman No D8–22–246 Tahun 2008 di Mahkamah Tinggi Kuala Lumpur terhadap plaintif dan penjamin ('Guaman 246 tersebut'). Defendan memasukkan penghakiman ingkar sebagai pembelaan terhadap plaintif dan penjamin. Plaintif membayar sejumlah RM3,915,313.76 kepada defendan berdasarkan penghakiman tersebut. Namun, menurut defendan, terdapat jumlah yang belum dijelaskan dan berhutang di bawah penghakiman dalam jumlah RM1,186,048.50 setakat 17 Mac 2014. Alasan plaintif terhadap tuntutan dalam lampiran 1 terhadap defendan adalah bahawa kewajiban pihak-pihak untuk membayar jumlah penghakiman di bawah penghakiman adalah merupakan tanggungjawab bersama kerana penghakiman tersebut tidak secara jelas menyatakan bahawa tanggungjawab tersebut adalah bersama dan berasingan. Sebagai tanggungjawab bersama, plaintif berpendapat bahawa setiap penghutang penghakiman hanya bertanggungjawab untuk membayar sebahagian kecil atau pro rata dari jumlah penghakiman, iaitu setiap penghutang penghakiman wajib membayar hanya RM947,725.73 iaitu 25% dari RM3,790,902,92 setakat 12 Jun 2008 sebagaimana ditetapkan dalam penghakiman. Isu-isu untuk ditentukan adalah: (a) sama ada penghakiman tersebut adalah terhadap plaintif dan penjamin secara bersama atau secara bersama dan berasingan; dan (b) sama ada terdapat perbezaan setakat mana tanggungjawab setiap pihak-pihak untuk membayar jumlah penghakiman di mana penghakiman dimasukkan terhadap dua atau lebih pihak dan penghakiman tersebut senyap atau tidak menyatakan bahawa tanggungjawab pihak-pihak adalah secara bersama dan berasingan.

Diputuskan, menolak permohonan plaintif di lampiran 1 dengan kos RM8,000:

(1) Meskipun penghakiman tersebut senyap pada sama ada tanggunjawab untuk jumlah penghakiman adalah secara bersama dan berasingan atau bersama, hak defendan terhadap plaintif adalah pada dasar bersama dan berasingan sebagaimana yang diperuntukkan dalam lampiran tersebut dan ia secara berterusan menghidupkan penghakiman. Sepertimana kes kedua-dua tanggungjawab bersama dan tanggungjawab berasingan, setelah pemiutang mendapat penghakiman terhadap peminjam bersama dan berasingan, pemiutang dapat meneruskan untuk menguatkuasakan terhadap setiap peminjam untuk keseluruhan tanggungjawab tersebut. Sama ada setiap kontrak membangkitkan tanggungjawab bersama atau berasingan atau bersama dan berasingan adalah bergantung kepada niat pihak-pihak. Dalam kes tanggungjawab bersama dan berasingan, hak untuk bahagian antara peminjam bersama dan berasingan bergantung kepada kewujudannya setelah pemiutang memilih untuk menyaman secara bersama atau pemilihan untuk memutuskan yang akan melucutkan hak peminjam untuk memberikan bahagian (lihat perenggan 21 & 32–33 & 38).

(2) Di bawah *common law*, terdapat perbezaan antara tanggungjawab bersama dan tanggungjawab bersama dan berasingan apabila ianya berkaitan dengan isu tiada percantuman pihak-pihak. Dalam kes tanggungjawab bersama, sekiranya satu atau lebih peminjam bersama tidak dicantumkan dalam suatu tindakan, setiap penghakiman yang dimasukan terhadap peminjam bersama yang dijadikan defendan dalam suatu tindakan akan berfungsi sebagai penghalang kepada tindakan selanjutnya terhadap pihak yang tidak bercantum. Dalam kes tanggungjawab berasingan, jelas bahawa setiap peminjam mungkin akan disaman secara berasingan dan secara individu tanpa kaitan dengan peminjam bersama. Dalam kes tanggungjawab bersama dan berasingan, ianya dengan jelas bahawa tanggungjawab setiap penghutang sama ada bersama atau berasingan adalah berdasarkan budi bicara pemiutang. Pemiutang mungkin memilih untuk meneruskan terhadap setiap peminjam secara berasingan atau terhadap kesemuanya secara bersama, mengikut budi bicaranya. Peminjam bersama yang tidak dicantumkan tidak sama sekali bermaksud bahawa setiap peminjam bersama hanya bertanggungjawab atas bahagian hutang mereka seperti yang dihujahkan oleh peguam plaintif yang bijaksana (lihat perenggan 45–49).]

Cases referred to

Alliance Bank Malaysia Bhd (formerly known as Multi Purpose Bank Bhd and Malaysia French Bank Bhd) v Mukhriz bin Mahathir & Anor [2006] 4 MLJ 451; [2006] 2 CLJ 723, HC (refd)
Balgobin v South West Regional Health Authority [2012] UK PC 11, PC (refd)
Brooks v Stuart (1839) 112 ER 1437, KBD (refd)
Clayton v Kynaston (1698) 91 ER 483, KBD (refd)
Cocke v Jenner (1614) 80 ER 214, KBD (refd)
Collins v Prosser (1823) 107 ER 250, KBD (refd)
Daulat Ram v Punjab National Bank 1933 AL 505, HC (refd)
Dynasty Rangers Sdn Bhd & Anor v Perak Meat Industries Sdn Bhd [2002] 5 MLJ 291, HC (refd)
Gifford, Ex parte (1802) 31 ER 1318, Ch D (refd)
Gulf Business Construction (M) Sdn Bhd v Israq Holding Sdn Bhd [2010] 5 MLJ 34, CA (refd)
Hemendro Coomar Mullick v Rajendrolall Moonshe (1878) ILR 3 Cal 354, HC (refd)
Kendall v Hamilton (1879) 4 App Cas 504, HL (refd)
King v Hoare (1844) 153 ER 206 (refd)
Lembaga Kumpulan Wang Simpanan Pekerja v Edwin Cassian a/l Nagappan @ Marie [2020] MLJU 304; [2020] 1 LNS 226, CA (distd)
Mathewson's case (1594) 77 ER 84, KBD (refd)
Mercantile Bank of Sydney v Taylor [1893] AC 317 (refd)
Muhammad Askari v Radhe Ram Singh & Ors (1900) ILR 22 All 307, HC (refd)

A *Narendra Chandra v Pushupati* 1949 A Cal 242 (refd)
Natal Investment Co, Re; Nevill's Case (1870) LR 6 Ch App 43
Personal Representatives of Tang Man Sit v Capacious Investments Ltd [1996] AC 514, PC (distd)
Pirie v Richardson [1927] 1 KB 448, CA (refd)
B *Slingby's case* (1586) 77 ER 77, KBD (refd)
Sorsbie v Park (1843) 152 ER 1146 (refd)
Sumathy a/p Subramaniam v Subramaniam a/l Gunasegaran and another appeal [2017] 6 MLJ 753, CA (distd)

C **Legislation referred to**

Contracts Act 1950 ss 44, 44(2), (3), 45
Employees Provident Fund Act 1991 s 46
Rules of Court 2012 O 15 r 4

D *Leonard D'Cruz (Chetan Jethwani & Co) for the plaintiffs.*
Frances Peter (Nuraqilah bt Abdul Nasir and Muhammad Naif Amal bin Zulkiflie with him) (Frances, Hazlina & Partners) for the defendant.

E **Ong Chee Kwan JC:**

[1] In the case where the obligation is joint among two or more parties, is the individual joint obligor obligated to meet the debt in its entirety or is each joint obligor bound himself only for his aliquot share as in proportionate to the
F number of joint obligors for the debt? This is the main issue before the court in this case.

BACKGROUND FACTS

G **[2]** On 8 November 2006, the defendant granted to the first and second plaintiffs a housing loan amounting to RM3.76m ('the loan') to finance the purchase of a house at No 5 Jalan Lembah Tunku, Bukit Tunku, Kuala Lumpur ('the property').

H **[3]** The loan was secured by two guarantees, namely, a personal guarantee from the first and second plaintiffs' father, one Thakurdas a/l Naraindas and a corporate guarantee by one MAX Celebrity (M) Sdn Bhd (collectively 'the letters of guarantee').

I **[4]** The property was also charged to the defendant as further security for the loan.

[5] The first and second plaintiffs defaulted in the repayment of the loan and the defendant filed a civil action vide Suit No D8–22–246 of 2008 in the Kuala

Lumpur High Court against the plaintiffs and the guarantors ('the 246 Suit'). A

[6] On 12 June 2008, the defendant entered judgment in default of defence against the plaintiffs and the guarantors in the following terms:

> TIADA PEMBELAAN telah disampaikan oleh Defendan-Defendan dalam tindakan ini dan ADALAH PADA HARI INI DIHAKIMKAN bahawa Defendan-Defendan yang dinamakan di atas hendaklah membayar kepada Plaintif seperti berikut: B
>
> (a) Pembayaran amaun keseluruhan tertunggak sebanyak RM3,790,902.92 setakat 16 Oktober 2007; C
>
> (b) Faedah pada kadar 5.75% setahun yang dikira atas dasar bulanan dari 17 Oktober 2007 hingga tarikh penghakiman sehingga penyelesaian penuh; dan
>
> (c) Kos tindakan RM 270. D

('the judgment')

[7] The plaintiffs have paid a sum of RM3,915,313.76 to the defendant under the judgment. However, according to the defendant, there is still outstanding and due under the judgment a sum of RM1,186,048.50 as at 17 March 2014. E

[8] In this originating summons, the plaintiffs seek from the court the following primary reliefs: F

(a) a declaration that the first plaintiff does not owe any sums to the defendant under the judgment;

(b) a declaration that the second plaintiff does not owe any sums to the defendant under the judgment; G

(c) a declaration that the defendant owes RM727,091.85 to the first plaintiff;

(d) a declaration that the defendant owes RM727,091.85 to the second plaintiff; H

(e) an order that the defendant pays RM727,091.85 to the first plaintiff within seven days from the order with interests from 2 July 2013 until full realisation at such rate deems fit by this court; and I

(f) an order that the defendant pays RM727,091.85 to the second plaintiff within seven days from the order with interests from 2 July 2013 until full realisation at such rate deems fit by this court.

[9] The plaintiffs' ground for the claims against the defendant is that the obligation of the parties to pay the judgment sum under the judgment is necessarily a joint obligation as the judgment did not expressly state that the obligations are joint and several. As a joint obligation, the plaintiffs contend that each of the judgment debtors is only liable to pay an aliquot or pro-rated share of the judgment sum, ie each judgment debtor is obliged to pay only RM947,725.73 being 25% of RM3,790,902.92 as at 12 June 2008 as adjudged in the judgment.

[10] In support, the plaintiffs relied heavily on the decision of the Court of Appeal in *Sumathy a/p Subramaniam v Subramaniam a/l Gunasegaran and another appeal* [2017] 6 MLJ 753 where Her Ladyship Mary Lim JCA (as she then was) held at para [12] of the judgment as follows:

> [12] It is the argument of both appellants that while the respondent may be entitled to enter judgment for the same single sum, which the respondent did, the liability of each of them is necessarily joint. This is because, the summary judgment that was entered has not specified that both appellants are jointly and severally liable for that single sum. Where the judgment is silent or has not specified that liability is joint and several. The liability is necessarily joint. Where liability is joint, each of the appellants as defendant, shares that liability equally — see In *Re Dato Elamaran M Sabapathy; Ex P RHB Bank Bhd* [2010] MLJU 1424; [2011] 10 CLJ 262. And so, when it comes to enforcing the judgment, the respondent has a right to enforce only half the judgment sum against each appellant. The respondent is not entitled to enforce the full sum against both of them, certainly not at the same time.

[11] The judgment in *Sumathy* has been followed in a recent Court of Appeal of *Lembaga Kumpulan Wang Simpanan Pekerja v Edwin Cassian a/l Nagappan @ Marie* [2020] MLJU 304; [2020] 1 LNS 226.

[12] Based on the aforesaid decisions, the plaintiffs contended that they have each mistakenly overpaid the defendant by the sum of RM727,091.85 each as under the judgment.

THE CASE FOR THE DEFENDANT

[13] Learned counsel for the defendant contended that the judgment was a judgment against the plaintiffs and the guarantors on a joint and several basis notwithstanding the judgment being silent on this point. This is because the terms of the loan and the letters of guarantee expressly provided for liability to be joint and several.

[14] In any case, as a matter of law, learned counsel for the defendant submitted that even where judgment is ordered against two or more defendants

jointly, each of the defendant is legally liable to pay for the whole judgment sum.

THE LEGAL ISSUES

[15] There is only two legal issues in this action — (1) whether the judgment was against the plaintiffs and the guarantors jointly or jointly and severally; and (2) where a judgment is entered against two or more parties and the judgment is silent or has not stated that the liability of the parties are joint and several, what is the extent of the obligation of each of the parties to pay the judgment sum?

COURT DELIBERATION

[16] Learned counsel for the defendant contended that the judgment entered against the plaintiffs and the guarantors was based on the terms of the annexure and the letters of guarantee, both dated 28 December 2008 which expressly provided that they are to be jointly and severally liable to pay the judgment sum to the defendant.

[17] Specifically, in the annexure to the loan document dated 28 December 2006, the interpretation cl (b) thereto, sub-cl (x) provides:

> Where there are two (2) or more persons or parties included or comprised in the expression 'the Borrower(s)' or 'the Chargor(s)', agreements, covenants, terms, stipulations and undertakings expressed to be made by and on the part of the Borrower(s) and the Chargor(s) shall be deemed to be made or binding upon such persons or parties *jointly and severally*. (Emphasis added.)

[18] Similarly in the letters of guarantee dated 28 December 2006 executed by Thakurdas a/l Naraindas and Max Celebrity (M) Sdn Bhd, the undertaking by the guarantors are also expressly stated to be on a joint and several basis.

[19] Thus, the facts of the present case is more akin to that in *Alliance Bank Malaysia Bhd (formerly known as Multi Purpose Bank Bhd and Malaysia French Bank Bhd) v Mukhriz bin Mahathir & Anor* [2006] 4 MLJ 451; [2006] 2 CLJ 723 that was distinguished by the Court of Appeal in the case of *Sumathy Subramaniam* where Mary Lim JCA (as she then was) held:

> [21] Having examined the decision in *Alliance Bank Malaysia Bhd*, it is clear that the decision is not directly on point. In that case, judgment in default was entered against one of two defendants. Although the claim against the defendants was premised on joint and several liability that was not reflected in the reliefs sought and in the default judgment that was entered. The plaintiff later sought to proceed with its action against the other defendant. It was in defence to this later action that the principle of joint and several liability was discussed. It was the view of Ramly Ali J

(as he then was) that:

> The fact that the said judgment in default dated 25 January 2005 against the second defendant as well as the prayer in the plaintiff's statement of claim do not state or insert the words 'jointly and severally' does not in any way change the position. The plaintiff's right on the cause of action against both the defendants either jointly or individually (ie severally) still survives. The plaintiff can always proceed against the first defendant even though a final judgment in default had been entered against the second defendant.

[20] The facts in *Sumathy Subramaniam* are distinctively different from the present case. This is clear from the following passage by Mary Lim JCA (as she then was):

> [26] From what we can see of the summary judgment dated 4 September 2015, it is plain that it pronounces both appellants liable and that their liability is joint. *We cannot read or infer the appellants' liability to be joint and several as such a reading would go against the plain terms of the judgment. In any event, there are no express terms in the loan agreement indicating that the parties have agreed that the liability of the borrower and the guarantor is joint and several. It would therefore be contrary to the contractual arrangements reached between the parties if this court were to read that the liability of the appellants is joint and several.* (Emphasis added.)

[21] Accordingly, I hold that notwithstanding that the judgment is silent as to whether the obligations for the judgment sum are joint and several or joint only, the defendant's rights against the plaintiff in this case is on a joint and several basis as provided for in the annexure aforesaid and this continues to survive the judgment. This was in fact specifically alluded to by the Court of Appeal in *Sumathy Subramaniam* as alluded to in the aforesaid passage of the judgment.

[22] The other Court of Appeal case of *Lembaga Kumpulan Wang Simpanan Pekerja v Edwin Cassian a/l Nagappan @ Marie* [2020] MLJU 304; [2020] 1 LNS 226 which was referred to by learned counsel for the plaintiff was also a case involving bankruptcy proceedings. Although the statement of claim in that case was based on a claim against the defendants on a joint and several basis under s 46 of the Employees Provident Fund Act 1991, nevertheless the Court of Appeal was not prepared to construe the judgment which was silent on the basis of liability to mean liability on a joint and several basis.

[23] However, if one perused the reasoning of the Court of Appeal in that case, it will be immediately clear that the Court of Appeal was very much influenced by the fact that the judgment which they were dealing with was a consent judgment. This is clear from the following passage of the judgment:

> [11] As a starting point, we do not think that we can import joint and several

liability into the consent judgment notwithstanding s 46 of the EPA Act 1991. A consent judgment is a contract between the parties and when it is recorded, it is presumed that both parties have understood and accepted the terms and conditions, and that such agreement binds the parties to the performance and obligations thereunder. KWSP's counsel's concession that they had the option to apply to amend or vary the consent judgment fortifies our view.

[24] Accordingly, with respect to learned counsel for the plaintiffs, I am unable to agree that both the Court of Appeal case of *Sumathy Subramaniam* and *Lembaga Kumpulan Wang Simpanan Pekerja* are applicable to this case. Thus, in my judgment the finding by this court that the liability of the plaintiffs under the judgment is joint and several suffices for this court to dismiss the plaintiffs' originating summons filed herein.

[25] In any case, I do not think that the Court of Appeal in *Sumathy Subramaniam* stands for the general proposition as contended by the plaintiffs that in a judgment ordered against two or more defendants jointly, the plaintiff can only enforce against each of the defendants his aliquot share of the judgment sum.

[26] The obligation of two or more parties to any agreement for the performance of *one* duty is described in common law as a joint obligation. The law regards these agreements as embodying a single indivisible promise which gives rise to a single indivisible obligation. The obligors are conceived to be but one person. All the joint obligors are necessary parties to the suit on the obligation.

[27] As a joint obligation, all the obligors are obligated to perform the entirety of the obligation when called upon by the creditor or obligee. This means that when judgment is rendered against all the joint obligors, the creditor may enforce against each of the joint obligors severally and individually to satisfy the judgment sum.

This common law position is expressed in s 44 of our Contracts Act 1950 which states:

> 44(1) Where two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any (one or more) of such joint promisors to perform the whole of the promise.

[28] However, where two or more parties promised separately to perform a separate duty to a same creditor such that each of the promise is one separate, completely unrelated promise and thereby giving rise to *several distinct* duties which are each enforceable by a separate action, such obligation is known as a

several obligation. This is notwithstanding that the parties may sign a single document (see *Mathewson's case* (1594) 77 ER 84; *Collins v Prosser* (1823) 107 ER 250).

[29] Where the obligations are several, each of the obligors is treated as being indebted personally and individually and in a manner completely unrelated to one another. In such an instant, the creditor has a separate and distinct causes of action against each of the several obligors. There is no obligation for the creditors to join all the obligors in the action commenced for the purpose of compelling the performance of the duty.

[30] Again, where judgment is obtained against the several obligors, each of the obligors is obligated to perform the entirety of their respective obligations and the creditor may enforce the judgment against any of the several obligor severally and individually to the extent of their respective assumed obligations. Further, in *Balgobin v South West Regional Health Authority* [2012] UK PC 11, Lord Kerr held:

> ... where there is no joint contract or relationship of principal and agent and the obligations are several, a judgment in an action against one is no bar to an action against another: *Isaacs Sons v Salbstein* [1916] 2 KB 139 at p 152 per Swinfen Eady LJ ...

[31] The joint obligation and the several obligation may be combined to obtain the benefits of both concepts to give rise to what is known as a joint and several obligation. Each of the obligors is individually and separately obliged to perform the duty and at the same time all are also jointly obligated. The creditor may choose to join all the obligors in an action or only commence the action against one or more of the obligors. The principle is that whilst a judgment against one joint and several obligor discharges the joint obligation, it does not impair the several duties of the obligors.

[32] As with both the case of the joint obligation and the several obligation, upon the creditor obtaining judgment against the joint and several obligors, the creditor may proceed to enforce against each of the obligors for the entirety of the obligation.

[33] Whether a particular contract gives rise to a joint or several or joint and several obligation will depend on the intentions of the parties (see *Sorsbie v Park* (1843) 152 ER 1146). Just as in the present case, from the terms of the annexure, it is clear that the parties had intended the plaintiffs' obligations to the defendant to be joint and several.

[34] What is clear is that regardless of the type of obligation undertaken by

the parties, all persons liable for the same performance owe the debt in its entirety. This means that, each of the obligors, whether the obligation is joint, several or joint and several, is obligated to perform the entire obligation when called upon by the creditor. However, although all the obligors are liable for the entire performance, the creditor cannot and is not entitled to recover any amount in excess of the judgment sum whether against one obligor or by all obligors for the aggregate amount. Once the creditor has received the full satisfaction of the claim, all the legal relations between the creditor and the obligors are extinguished. In the Privy Council case of *Personal Representatives of Tang Man Sit v Capacious Investments Ltd* [1996] AC 514, Lord Nicholls of Birkenhead delivered the following passage on double satisfaction:

> ... a plaintiff cannot recover in the aggregate from one or more defendants an amount in excess of his loss. Part satisfaction of a judgment against one person does not operate as a bar to the plaintiff thereafter bringing an action against another who is also liable, but it does operate to reduce the amount recoverable in the second action. However, once a plaintiff has fully recouped his loss, of necessity he cannot thereafter pursue any other remedy he night have and which he might pursued earlier. Having recouped the whole of his loss, any further proceedings would lack a subject matter. This principle of full satisfaction prevents double recovery.

[35] The aforesaid is to be distinguished when it comes to the parties' obligation inter se. There may be an agreement among the parties themselves that each is only liable for a rateable share or a determined part of the entire obligation. Where there is no prior agreement, the obligor who has been prejudiced is entitled to seek contribution as a matter of right. This right to contribution depends upon the type of liability that the parties have assumed and their peculiar relationship with one another.

[36] For example, between equally interested obligors which is the usual case, each is indebted for his rateable share. So, in the case of joint obligors who are equally interested in the contract, the prejudiced obligor who has overpaid his part can recover only that which exceeds his share. Again, the right to contribution in the case of joint promisors is codified in s 44(2) and (3) of the Contracts Act 1950 which provide:

> (2) Each of two or more joint promisors may compel every joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.
>
> (3) If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

[37] On the other hand, in the case of several liability, there is no right of contribution as the obligors have each elected to stand on his own right to perform the contract.

[38] In the case of joint and several liability, the right of contribution between the joint and several obligors depends for its existence upon the election of the creditor to sue jointly or an election to sever which would deprives the obligors of their right of contribution.

[39] A good exposition of the aforesaid principles is stated by Kang Hwee Gee J (as he then was) in *Dynasty Rangers Sdn Bhd & Anor v Perak Meat Industries Sdn Bhd* [2002] 5 MLJ 291. In that case the petitioner applied to wind up the respondent company on the ground that it was unable to pay its debt. The debt arose from an arbitration award where the arbitrator had in his final award adjudged and directed the respondent to pay two sums to the petitioner. The respondent opposed the petition solely on the ground that the arbitration award was against two joint respondents. It was argued that it was not opened to the petitioner to proceed against only one respondent.

[40] The learned judge held that when a judgment debtor was under a joint liability with another to pay a debt, either of them may have to bear the whole of that liability all by himself to the creditors up to the limit of the judgment sum. That from the standpoint of the judgment creditor, the liability was several in the sense that he was at liberty to choose on whom to enforce the judgment sum, whether only on one judgment debtor individually or on both collectively. The relevant passages of the judgment are as follows:

> There is no direct case law on this point, so I am informed by counsel with respect to the legality of commencing a winding up petition against only one company based on a judgment obtained jointly against two companies. But there are a number of decisions where bankruptcy petitions were presented against one only of two or more joint judgment debtors.
>
> Counsel for the respondent relied on the judgment of Shaik Daud J (as he then was) in *Yeo Ah Wang lwn United Malayan Banking Corp Bhd* [1991] 1 AMR 38 where a bankruptcy notice was issued from a judgment obtained jointly against three defendants. The judgment creditor issued a judgment notice only against one of the defendants. It was held that a judgment notice was bad in law as it was contrary to the judgment in which all the three defendants were found jointly liable to pay the judgment sum.
>
> However, in the older case of *Re Balasubramaniam; ex p Annamalai* (1957) 3 MC 128, Sutherland J held that it was perfectly in order for the judgment creditor in that case to issue a judgment notice against a co-defendant who had been adjudged jointly liable to pay the judgment of the judgment creditor.
>
> But Sutherland J spoke with high authority and I am inclined to agree with him. He relied on the English Court of Appeal case of *Re Low; ex p Gibson* [1895] 1 QB 734 wherein Lord Esher MR, having to rule on a similar point whether a judgment notice under the English Bankruptcy Act 1883 involving a judgment debt entered against joint judgment debtors.
>
> I have no doubt that Sutherland J was correct. The reasoning of Lord Esher MR in

Re Low; ex p Gibson could not have been clearer. Two convincing arguments were put before the court in that case.

First, it was argued that a writ of execution based on a joint obligation to pay the judgment creditor's debt had always been joint, and since a bankruptcy notice depends on the judgment creditors right to execution, the notice should be directed to the debtor and all the other joint debtors, although it need not be served on those against whom it was not intended to proceed. Secondly, the non-compliance of a judgment notice carried with it a semi-penal consequence which makes it essential for the judgment creditor to follow the forms of the judgment by citing all the judgment debtors jointly, and not just one of them, as was done in that case. It was not open to the judgment creditor to amend the judgment notice under s 143 of the Act — for to do so would be to create an act of bankruptcy for the judgment creditor when in the first instance the judgment debtor had not known what the act of bankruptcy against him was about.

Both arguments were rejected. Lord Esher MR in his short judgment (Lopes LJ concurring) ruled as follows at p 736:

The debtor was well aware of the fact that the action was against all six persons named, and he also knew that the judgment was against him and three of the other defendants. He could be in no doubt as to the identity of the action, and it is obvious that the point put forward to invalidate the notice was merely a formal objection, and that the defect in the notice could not work any injustice. The irregularity was unimportant and could be amended, and the notice could not be treated as bad.

The other point raised is not one on which the notice should be set aside. It is said that where the judgment is a joint one against several defendants, a bankruptcy notice cannot be effective except it is drawn up against all the defendants, although it need only be served on the one it is desired to make bankrupt. I failed to see what good it can do that one to have the names of the others put in the notice when there is absolutely no necessity for serving it on them. This is a technicality to which we ought not to listen.

Much confusion has arisen in the matter because of the difficulty in understanding the effect of a joint liability which two or more losing defendants have to bear vis a vis the right of the winning plaintiff to enforce the judgment debt.

One must appreciate that when a judgment debtor is under a joint liability with another to pay a debt, either of them may have to bear the whole of that liability all by himself to the creditor up to the limit of the judgment sum. From the standpoint of the judgment creditor, that liability is several in the sense that he is at liberty to choose on whom to enforce the judgment sum whether on one judgment debtor individually or on both collectively. That principle had never been in dispute and had in fact been confirmed in the judgment of Lord Esher MR in *Re Low*.

[41] Kang Hwee Gee J's aforesaid judgment was adopted with approval by the Court of Appeal in *Gulf Business Construction (M) Sdn Bhd v Israq Holding Sdn Bhd* [2010] 5 MLJ 34 at p 39 where Abdul Malik Ishak JCA by way of obiter dicta stated:

A [5] Now, even if the court order was not made jointly and severally against both the respondent and Tetuan Par Govind & Co, yet either one of them would still have to bear the whole of that liability all by itself up to the limit of the judgment on the strength of the authority of the case of *Dynasty Rangers Sdn Bhd & Anor v Perak Meat Industries Sdn Bhd* [2002] 5 MLJ 291.

B

[42] Learned counsel for the plaintiff sought to persuade this court that the legal position in Malaysia regarding the concepts of 'joint' and 'joint and several' liability' is encapsulated in O 15 r 4 of our Rules of Court 2012 ('the court rules') which stipulates:

C

Joinder of parties (O 15 r 4)

(3) Where relief is claimed in an action against a defendant who is jointly liable with some other person and also severally liable, that other person need not be made a defendant to the action; but where persons are jointly, but not severally liable under

D a contract and relief is claimed against some but not all of those persons in an action in respect of that contract, the Court may, on the application of any defendant to the action, by order stay proceedings in the action until the other persons so liable are added as defendants.

E **[43]** According to learned counsel for the plaintiffs, the aforesaid meant that where liability is joint between co-debtors, they can be forced to be made defendants and thereby share liability. The creditor cannot choose to merely make one party liable for the whole debt.

F **[44]** With respect, the joinder of parties in O 15 r 4 of the court rules has to do with the *effect* of the non-joinder of joint obligors and has nothing to do with the *extent* of the obligations of each of the joint obligors.

G **[45]** Under common law, there is a distinction between joint obligations and joint and several obligations when it comes to the issue of non-joinder of parties.

[46] In the case of joint obligations, if one or more of the joint obligors are

H not joined in an action, any judgment that is obtained against the joint obligors who are made defendants in the suit will operate as a bar to any subsequent action against the parties not joined (see *Pirie v Richardson* [1927] 1 KB 448; *King v Hoare* (1844) 153 ER 206; *Kendall v Hamilton* (1879) 4 App Cas 504) (save for certain exception, eg where the non-joined obligor is outside the

I jurisdiction of the court). Of course, the joint obligors who are made parties to the suit can always object to the non-joinder and or apply for the other joint obligors to be made a party to the suit. This is the reasons behind O 15 r 4.

[47] In the case of several obligations, it is clear that each of the obligors may

be sued separately and individually with no relation to his co-obligor. A

[48] In the case of joint and several obligations, it would seem that the duty of each obligor is either joint or several at the discretion of the creditor (see *Slingby's case* (1586) 77 ER 77). Thus, the creditor may either choose to proceed against each of the obligors severally or against all of them jointly, at his discretion. Once the election is manifested, the cause becomes subjected to the rules peculiar to the form of action that has been chosen. B

[49] The non-joinder of a joint obligor does not at all mean that each of the joint obligors is only liable for their aliquot share of the debt as contended by learned counsel for the plaintiffs. C

[50] For completeness, just as there is no distinction in the enforcement of a judgment in respect of the joint, several and joint and several obligations (ie the judgment creditor can enforce against each of the obligors for the whole judgment sum), there is little, if any, difference when it comes to the *discharge* of the obligations for these different type of contractual obligations. D

[51] Under common law, in the case of a joint obligation, since a joint promise of several parties gives rise to an undivided and a single duty, the release of one obligor will result in the release of all obligors (see *Brooks v Stuart* 112 ER 1437). The rationale is that the release of one joint obligor will prejudice the rights of contribution held by the other joint obligors. For example, where A, B and C are joint obligors and the creditor, X releases A of his obligation. This will result in either A's duty to contribute to be abrogated without the consent of B and C or A being still bound to indemnify B and C, which renders the discharge meaningless (see *Re Natal Investment Co, Nevill's Case* (1870) LR 6 Ch App 43; *Gifford, Ex parte* (1802) 31 ER 1318). E F G

[52] However, the aforesaid common law position is varied in Malaysia by reason of s 45 of the Contracts Act 1950 which stipulates:

> 45 Where two or more persons have made a joint promise, a release of one such joint promisors by the promisee does not discharge the other joint promisor or joint promisors; neither does it free the joint promisor so released from responsibility to the other joint promisor or joint promisors. H

[53] It seems that the principle in the said s 45 also applies to judgment debts such that a release by the judgment creditor of some of the judgment debtors from liability under a judgment does not operate as a release of the other judgment debtors (see Strachey CJ dissenting judgment in *Muhammad Askari v Radhe Ram Singh & Ors* (1900) ILR 22 All 307; *Daulat Ram v Punjab National Bank* 1933 AL 505; *Narendra Chandra v Pushupati* 1949 A Cal 242) I

A although this position is still unclear (see *Hemendro Coomar Mullick v Rajendrolall Moonshe* (1878) ILR 3 Cal 354). It is not necessary for this court to deal with this issue in this case.

B **[54]** Similar position also applies in the case of joint and several obligation. At common law, it has been generally held that a release of less than all joint and several obligors effectively results in the discharge of all (see *Cocke v Jenner* (1614) 80 ER 214; *Clayton v Kynaston* (1698) 91 ER 483; *Mercantile Bank of Sydney v Taylor* [1893] AC 317). This suggests that the unitary characteristic of joint and several liability is given predominance over the severance C incorporated in the same contract.

[55] This is the reason why in most contracts of guarantee, there is always a clause that specifically provides that the lender's decision to release any of the D co-guarantors shall not be deemed as a release of the remaining guarantors' obligations.

[56] Coming back to the present case. In *Sumathy Subramaniam*'s case, the Court of Appeal rightly held that once a judgment is entered, the cause of E action has already merged with the judgment. This was a case dealing with bankruptcy proceedings against the judgment debtors who were jointly liable for the judgment sum. The serious consequences to a person adjudged as a bankrupt were expressed by Her Ladyship Mary Lim JCA (as she then was) in the judgment in the following passage:

F > [25] We cannot agree with the learned High Court judge who found that the amount that each appellant as judgment debtor is required to pay is only relevant at the time of discharge, and not at the time of issuance of the bankruptcy notice or even the creditor's petition. The adjudication of any person as a bankrupt is a serious and sombre act; it has far-reaching effects affecting not just the person's daily affairs, G doing of business or occupation but also his movements, especially egress and ingress of the country. The basis for petitioning a person to be adjudged a bankrupt must be done responsibly based on sound legal grounds.

[57] In that case, two separate bankruptcy notices were issued H *simultaneously*, one against the borrower and the other against the guarantor. In such a case, the Court of Appeal held that such bankruptcy notices are invalid as the judgment debtor would be unable to ascertain the amount needed to be paid. This is premised upon the principle that the creditor cannot and is not entitled to recover any amount in excess of the judgment sum whether against I one obligor or by all obligors for the aggregate amount. That this was the ground for the judgment is clear from the following passage:

> [27] The appellants cannot be expected to each pay the same sum and then seek correction from the official assignee when seeking a discharge. The existence of the two bankruptcy notices with similar terms and the same amount drives home the

appellants' contention that these notices are indeed, invalid. If both appellants were to pay up the same amount as they are required to do under the bankruptcy notices, the respondent would effectively be very much overpaid. Clearly, the sum stipulated in both bankruptcy notices are inaccurate and do not accord with the terms of the summary judgment.

[58] Hence, if the case is looked at based on the rationale stated above, it will be clear that the Court of Appeal was *not* setting down a general principle that a judgment creditor can only enforce as against each of the joint judgment debtors no more than his or her respective aliquot share of the judgment sum.

[59] In any case, even if I am wrong in my interpretation of the ratio decidendi of *Sumathy Subramaniam*, it is my judgment that that case can be distinguished from the facts in the present case for the reasons that I have set out above. Further, the case before this court has nothing to do with bankruptcy proceedings.

[60] In the premises, the plaintiffs' application under encl 1 is dismissed with costs fixed at RM8,000 subject to the payment of the usual allocator.

Plaintiff's application in encl 1 dismissed with costs of RM8,000.

Reported by Mohd Kamarul Anwar